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Architects and the Law.

A COLLECTION OF CASES TRIED IN THE ENGLISH,
CANADIAN, FRENCH AND AMERICAN COURTS OF
LAW, RELATING TO THE EVERY-DAY PRACTICE
OF THE PROFESSION OF ARCHITECTURE.

BY

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PREFACE.

In issuing this collection of Actions-at-Law relating to the profession of architecture my intention has been to put within reach of all architects in Canada instances in which the ordinary difficulties between architects and their clients and contractors have been ventilated and decided on in the Courts, with a view to enable architects before taking action against their clients, or allowing their clients to go to Law with them, to ascertain how cases similar to their own have been decided, and how the Law is likely to regard their claims.

In Canada it is English Law from which precedents are generally taken, but I have included a number of cases tried in the American Courts which have usually terminated with decisions corresponding to English judgments, and they will be found to be useful especially where similar cases have not come before the English Courts.

The cases reported here cover the last twenty years, and although I do not profess for this little work that it gives examples of every kind of dispute that can possibly arise between architects and their clients, yet I believe that architects in Canada will find it of considerable value and interest, and will therefore be willing to overlook its deficiencies.

R. W. GAMBIER-BOUSFIELD.

TORONTO, 1891.

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I.

CASES IN WHICH PROPRIETORS HAVE REFUSED TO PAY AN ARCHITECT'S RIGHTFUL COMMISSION.

MCLACHLAN v. GRANT, 1886.

This was a remarkable case in which the Defendant "thought she knew better than the architect" what the building ought to cost.

The Defendant, Miss Grant, authorized the Plaintiff to prepare designs for a school for 800 girls which was not to cost more than £2,000. Plaintiff told her it could not be done for the money, but she requested plans to be made notwithstanding, and Plaintiff warned her that a building for the site she had purchased would involve much greater outlay. Tenders were asked for and they ranged from £5,787 to £4,852. Defendant then dismissed the architect, requiring him to hand over the plans and offered to pay $2\frac{1}{2}$ per cent. on what she thought the building ought to cost. Miss Grant then took the matter into her own hands, let contracts and superintended the work herself and finally completed a building at the cost of over £7,000. McLachlan, the architect, then sued her for his commission, basing his claim on 3 per cent. on £4,852, the lowest *bona fide* tender, and $1\frac{1}{4}$ per cent. on £5,750, the estimated cost of the buildings arranged to be carried out as "future extensions." Miss Grant made a counter-claim for £800 as alleged damages for loss of time in completing her building through the refusal of the architect to give up the drawings and specifications, by which she stated she lost several of her pupils. Mr. Justice Cave, in summing up, characterized some parts of Defendant's claim as "monstrous," and the jury gave a verdict for the architect of $2\frac{1}{2}$ per cent. on £4,852 and ten guineas for extra work in preparing sketch plans to 16th scale of the complete design, making a total award of £131.16s. and costs to be paid by Defendant. The Plaintiff had claimed £217. 8s. 8d. The difference between his claim and the award must be put down to the peculiar characteristics of jurymen who always think they know better than a professional man what his services are worth.

ADAMS v. ARMSTRONG.

Case tried in County Court, Margate, Kent, Jan. 13th, 1881. Mr. Adams, an architect, claimed £10 balance of his commission for professional services in connection with the erection of some

cottages for the Defendant Armstrong who refused to pay on the ground that the walls were damp and that the paper he had put on them had come off in consequence. The borough surveyor reported that owing to the presence "of salt in the work and organic matter in the materials of which the plaster on the walls was composed" the paper had come off. It was a fair sample of plaster work for the particular class of house. The Plaintiff, Mr. Adams, proved that he had warned the Defendant that it was too soon to paper the walls. A compromise was suggested and agreed to and judgment was accordingly entered for the architect for £6, and costs to be paid by Defendant.

STEVENSON v. STEPHENSON.

Case tried at the Nottingham County Court, May, 1882. Mr. Stevenson, an architect, was commissioned by Dr. Stephenson to carry out a house for him. Plans were prepared and approved and contracts let. The architect told his client that he ought to employ a clerk of works as an architect could not be expected to visit the building more than two or three times a week, but Defendant did not think this necessary. The building was completed and the architect's commission amounted to £133. 12s., of which £90 had been paid. Defendant refused to pay the balance on the ground that the drains were out of order and the house unhealthy. The court decided it was clearly the duty of a clerk of works to look after these details and if the Defendant chose to save himself the expense of a clerk of works he must abide the consequences *for an architect could not be expected to be present to superintend these works.* Judgment given for the architect in full.

CORBETT & SONS v. RICHMOND & CHANDLER.

Tried at Manchester winter assizes, Feb., 1888. Corbett & Son, architects, sued for balance of commission due for services in connection with the erection of premises for the Defendants. Defendants claimed that builders' prices were too high and that in measuring up the work the architects had been negligent and had certified to too much work and material. Mr. Justice Cave referred the case to Mr. Ridley, the official referee. Defendants had had the work measured up and these measurements differed only by $\frac{3}{4}$ per cent. from the measurements upon which the architects had certified. Defendants admitted having ordered the work. The actual cost of the building was in the neighborhood of £10,000, and the referee characterized the charge of negligence as nonsense and reported entirely in favor of the architects. Judgment given accordingly.

BELL v. MOSS.

Tried before Mr. Justice Day at Manchester assizes, 1885. Plaintiff, an architect, sued Defendant, a clergyman, for £157. 2s. balance of account for professional services and for damage for wrongful termination of a contract, and in the alternative to recover payment for work and labor done. Defendant set up a counter-claim that Plaintiff had received certain moneys on his behalf that he had failed to account for. Mr. Addison, Q.C., characterized the counter-claim as the most unseemly defence ever laid before a jury. Charges of fraud were withdrawn, but the jury awarded Plaintiff a verdict for claim and counter-claim, damages £175. Application was made by Defendant's counsel for withholding payment of costs. This was refused.

TAYLOR & LOCKE v. GREEN & SONS, June, 1885.

This was an important case, as it defines an architect's responsibility as regards rights of adjoining owners, about which an architect was uninformed. The Plaintiffs, architects, sued to recover from Defendants £451 7s. 6d, balance of account for professional services in connection with the re-erection of premises in Cannon street and Nicholas Lane, London. Defendants made a counter claim for £3,680 on the ground that Plaintiffs had not properly carried on their work, inasmuch as Defendants alleged that they had not sufficiently considered or warned the Defendants as to claims of adjoining owners as regards light and air, and further, that during the erection of the building the Defendants had been put to great expense settling disputes with the neighbors, and these expenses they now claimed to recover from Plaintiffs. The Plaintiffs contended that they were in no way liable, as they had been especially employed to make plans and do the rest of the work according to express instructions of the Defendants. Jury awarded the Plaintiffs £389 17s. 1d. for works and the costs of the action, not entertaining the counter-claim of Defendants.

NORMAN v. LEZANT SCHOOL BOARD.

Mr. Justice Giffard, Stonehouse County Court, August, 1884. Mr. Norman, an architect, was employed by Defendants to report on building of school and master's home erected for Defendants, to ascertain if they had been carried out in accordance with specifications. Mr. Norman agreed to do this for a fee of £6 6s. He did so, but the matter was referred to arbitration, in which he was called as a witness, and he now sought to recover additional fees for these additional services. The Defendants paid £6 6s into court together with £2 2s. for expenses. The Judge stated that the architect was certainly entitled to additional remuneration, and verdict was given accordingly for Plaintiff with costs against Defendants.

TOMLINSON V. BARNET.

Mr. Tomlinson, an architect, was employed by Defendant to prepare plans and carry out some houses in London. The works being completed, the Defendant, an engineer, refused to pay the commission which had been agreed upon, and set up a counter-claim for negligence amounting to ten times the architect's commission. He failed, however, to prove any negligence. Judgment was therefore given for Plaintiff with costs against Defendant.

CHORLEY V. CROSSLEY.

Another case in which a client refused to pay a rightful commission to his architect, tried before Mr. Justice Manisty and a special jury, August, 1884. Plaintiff sued for fees amounting to £85 5s. 6d. for his attendance before arbitrators in two cases on behalf of Defendant. Defendant's grounds for not paying were that the charge was excessive and greater than agreed upon. The Judge heard only the opening remarks of the counsel and the Plaintiff's evidence when he decided Defendant could make no answer to the claim. The jury gave a verdict for the Plaintiff for the full amount of claim with costs against Defendant, including costs of special jury.

HAWARD V. KITCHING.

Suit for charges for time in travelling, before Mr. Justice Fry, 1890. The Plaintiff, an architect, sued Defendant for £166 18s. for professional services rendered at Darlington, and for £160 19s. 8d. for railway fares, travelling expenses, and time spent in the necessary visits to that town. Defendant paid the whole of the first amount into court, and also £72 2s. of the second amount, as sufficient in his opinion to meet the expenses of the Plaintiff. The present dispute was therefore only as to the right of the Plaintiff, the architect, to charge for time in addition to the 5 per cent. commission paid him. Plaintiff stated that he had paid seventeen visits and stayed three or four days each time, and had charged only £1 11s. 6d. a day for time, though the customary charge was £3 3s., according to the schedule of the Royal Institute of British Architects. Plaintiff was not, however, a member of that institution. He brought professional evidence to prove the custom of charging for time, one of his witnesses, Mr. Charles Barry, saying that though it was the custom it was not the universal practice to charge £3 3s. a day, but it was not customary to charge for time in supervising work. Mr. Justice Fry, without laying down any general rule as to architect's charges, thought that the amount paid into court was sufficient and gave judgment for the Defendant, but divided the costs.

See also Taylor and Davis below.

WHITMORE V. CRABB.

Custom as to professional fees refused as evidence.

Before Lord Chief Justice Coleridge, Nisi Prius Court, Essex Assizes, July, 1889. Plaintiff, an architect, brought suit to recover his commission at the rate of 5 per cent., amounting to £33, for professional services rendered to Defendant, and brought professional evidence to prove the custom, and as to the schedule of charges of the Royal Institute of British Architects, Lord Coleridge said "he would not accept the dictum of the R. I. B. A. in the matter of charges. This or that percentage could not be allowed as customary. The principle he would go upon would be that of *quantum meruit*, and architects should be paid like other people." English professional journals commenting on this ruling, remarked that the case afforded another instance of the extraordinary misapprehension under which learned judges seem to lie about the architectural profession.

In the case of *PARAIRE v. LOIBL*, before the same judge in 1881, in which Paraire, an architect, sued for his commission, Lord Coleridge observed that "as to basing a charge upon the prevailing custom of a profession he would not hear of it. It was merely a question of *quantum meruit*. No body or society had any right whatever to fix their charges at certain sums and say they were to be paid."

WHITAKER *et al* v. THE FLOATING SWIMMING BATH CO.

Before Lord Coleridge. Here again Lord Coleridge had an opportunity of stating his peculiar views with regard to the custom of professional charges. The Plaintiffs, civil engineers, were employed by the Defendants to prepare plans for a bath building to cost £16,000, and for this work the Plaintiffs charged 1½ per cent. (or £240), and had to sue the Company for the recovery of their charge. Lord Coleridge intimated that this was "an absolutely unreasonable charge," and in summing up said it was "plainly ridiculous." "It was a charge he had often heard architects make, but never knew a jury to sustain. The Plaintiffs were entitled to whatever their labor fairly represented, and *that the jury must assess*." The jury concluded that £70 was sufficient remuneration.

See case of C. W. Romeyn below.

NOTE.—No other judge appears to hold the views of Lord Coleridge with regard to custom in professional charges, as witness all other cases reported herein, where professional evidence was admitted without comment, and I can find no other cases in which such evidence has been refused in the English Courts.

See Bousfield v. Payne below.

TAYLOR V. DAVIS.

Suit for travelling expenses, tried at Montreal. Mr. Davis authorized Mr. Taylor, an architect of Montreal, to prepare plans,

etc., for a house to be erected at Ottawa, and before work was commenced asked what the architect's charges would be. Mr. Taylor stated that they would be the usual 5 per cent. commission. After completion of the works, the architect sent in his charge for the commission at five per cent., and an additional charge for travelling expenses between Montreal and Ottawa, but made no charge for time. The visits for which expenses were charged were proved to have been all made at the request of the proprietor by letters or telegrams, and were nearly twenty in number. The proprietor, however, refused to pay for these on the ground that no mention was made of travelling or other expenses in addition to the commission when he inquired of the architect his charges. Various architects gave evidence as to the custom of charging for travelling and time in addition, but the judge decided in favor of the Defendant (Davis), because he was not told beforehand that he would be expected to pay anything above the 5 per cent. commission.

BOUSFIELD V. PAYNE.

In this case, before Mr. Justice Morgan, at Toronto, 1890, in the Division Court, the learned judge refused to hear evidence as to professional customs with regard to architects' fees, and stated that he would not admit such evidence until such customs were regulated by Act of Parliament.

CHARNLEY V. KINSLEY.

Case tried in Chicago. Charnley, an architect, brought suit against his client to recover additional commission to the amount of \$4,328.55 for additional and particular services rendered by request of his client. The building had to be completed by a particular date, but although great despatch was used in the execution of the work there was barely time to complete it even if everything went on without delay. Kinsley, the client, and Defendant in the action, requested the architect to give up his whole time to the inspection of the works, verbally promising additional remuneration, but upon the architect sending in his account, refused to pay the amount claimed. The court, however, decided that it was *not customary for architects to give all their time to the superintendence* of the works and that the architect had done so in this case at the request of the proprietor. Judgment was given for the architect but he was awarded only \$2,180.

See Stevenson v. Stephenson above.

The case of Mr. C. W. Romeyn, architect, who sued a client for his commission, based upon the usual professional charges, and which his client refused to pay on the ground simply that *they were excessive*, was decided in favor of Mr. Romeyn.

A case reported from the courts in Brussels in which an architect sued his client for the balance of his commission for professional services, is of considerable interest. The claim included travelling expenses for one journey to Berlin. The defence was that travelling expenses were included in the commission; that the journey to Berlin was not authorized; that the work was unnecessarily delayed by the architect, and that the architect ought to pay for various defects that had been discovered and remedied. The court decided that the claim of the architect for the balance of his commission was fair, being charged at 5 per cent. on the cost; that necessary travelling expenses were properly charged in addition to the commission, but that the journey to Berlin was not shown by the architect to have been necessary, and that one per cent. with travelling expenses was the proper charge for sketches for work abandoned. It was proved that the delay in the completion of the works was due to the fault of the architect in not providing the necessary drawings in time, and that, therefore, the architect ought to pay interest at the legal rate of 5 per cent. on the land for the time of the delay. As to the claim that the architect should pay for the remedy of the defects found due to his fault, the Defendant admitted that the architect had not been notified at the time the investigation of the defects was made, and that as the repairs of these alleged defects had obliterated the defects if they existed, the Defendant had by his own act made it impossible to prove the exact cause of the defects by proper expert evidence under the order of the court, and therefore such a claim could not be established.

II.

CASES RE COMMISSIONS FOR WORK ABANDONED.

SNELL v. CARNELL. (*A taxed account.*)

At Stonehouse County Court, before Mr. Justice Giffard, 1883. In 1881 Mr. J. Carnell asked Mr. H. J. Snell to prepare plans and specifications for a house. When these were all ready the Princetown Railway Co. wanted to run through the land, and then at Defendant's request Plaintiff prepared plans for the laying out of the estate in building lots and roadways. For this purpose numerous visits had to be made to this property, consultations with Defendant to be held, and tracings of the plans were made. Plaintiff drew up evidence and attended arbitrations. He sent in his account which was taxed and cut down to £22 2s. 9d. which he had received, and he now sued to recover the balance £12 2s. 9d., and he brought

witnesses to prove the correctness of his charges. The judge said he did not see anything unreasonable considering the amount of ability, knowledge, learning and skill which Plaintiff brought, and he did not think the amount of costs allowed on taxation was any criterion. Judgment given for Plaintiff for full amount of account and costs.

HESKETH v. ROLLWAGEN.

Liverpool Assizes, before Mr. Justice Kay, 1883. Plaintiff, an architect, sued Defendant for between £200 and £300 for preparing plans for an hotel. Defendant had agreed to pay 2½ per cent. for plans if work was abandoned, and 5 per cent if carried out. Application had to be made by Defendant for a provisional license and for this purpose it was necessary to exhibit the plans of the proposed building to the License Commissioners. Plans were made and provisional license applied for, but it was refused because plans did not show any stable buildings. Defendant instructed Plaintiff to prepare drawings of these and estimates which came out between £8,000 and £10,000. When this was done, Defendant applied again for the license which was granted. Defendant then further instructed Plaintiff to go on and get everything ready by a certain date for tendering. This he did, but between the time when they were ready and the end of the month, about a fortnight, Defendant changed his mind about building the hotel, and when Plaintiff sent in his account pretended to be surprised at the estimates and said they far exceeded his intention and refused to pay anything at all for the work done. Plaintiff proved that Defendant had given no idea of the cost he would go to, but had remarked that a few thousand pounds were immaterial. The defence was that Defendant had stipulated for a building to cost only £3,000. The jury awarded the Plaintiff £200 and costs.

See Moffatt v. Dickson (preliminary drawings).

KEELING v. BEGBIE.

Before Mr. Francis Roxborough, Jr., Lord Mayor's Court, London, 1888. Plaintiff, an architect, said his father who was now dead, was consulted by the Defendant as to the disposal of a large building site in Westminster. A company was formed subsequently for building a large concert hall on the site, and it was arranged that if his father was instrumental in forwarding the scheme for the sale of the site, he should be paid by the Defendant £50 for his services, but if he was appointed architect for the building, this should be waived. The death of his father occurred shortly afterwards, and he the Plaintiff took up his father's practice. He prepared plans for the Defendant for the hall, and estimated the cost at £80,000. The scheme fell through, and he charged 2½ per cent. commission.

The defence was that the plans were only competitive, that there was no binding agreement with Plaintiff, and also that the plans were prepared to a great extent before the death of the Plaintiff's father. Defendant admitted that he had offered the Plaintiff £75, although he considered he only owed him two or three guineas, but he did so "in order to get rid of him." The jury returned a verdict for the Plaintiff of £500. Judgment given accordingly.

TOWNSEND V. SMITH.

Toronto, Canada. Before Mr. Justice Boyd. Plaintiff, an architect, sued his client for commission at rate of 1 per cent. on estimated cost for sketches prepared at request of Defendant, who claimed that he had not ordered Plaintiff to prepare the sketches, but that Plaintiff had done so on speculation, and also that, with the exception of one floor plan and one elevation drawn to a scale of $\frac{1}{16}$ inch to a foot, they were not to scale, and therefore did not come under the head of "sketches," as mentioned in the schedule on which Plaintiff had based his claim. Defendant brought professional evidence to prove this point, but the witness stated that he had not observed that any of drawings were to scale, and therefore his evidence fell through. The judge remarked it was not likely that an architect would do such work on speculation, and ordered judgment for Plaintiff and costs.

WYLIE V. WILLMER.

Tried at Liverpool, 1861, before the Assessor. Wylie, an architect, sued Willmer for his commission of $2\frac{1}{2}$ per cent. for preparing plans and specifications for a building for business purposes on the amount of the lowest tender of £6,000. The Defendant proposed to erect a building to cost £2,000, but while the drawings were in progress, he called repeatedly to see "how they were getting on," sometimes twice a day, and constantly required alterations to be made, which raised the cost of the building considerably, so that the tenders came out at £6,000. Defendant abandoned the work upon learning this, and expected to pay the Plaintiff's account on this basis. He proved that he had repeatedly warned his architect that the cost must not exceed £2,500 at the outside, and had no idea that the alterations he suggested would increase the cost beyond that amount. The Plaintiff proved that he had repeatedly warned Defendant that he was increasing the cost materially. The assessor said it was for the jury to decide which of the parties in the action was to be believed, and in answer to a juryman stated that they must give a verdict for the Plaintiff for the full amount, or give it against him. They could not give a verdict for payment on £2,500, or any amount under the £6,000, because the Plaintiff had been ordered to prepare plans for a build-

ing to cost a certain sum, and if he had made them for a building to cost much more, he had not done the work he was required to do, and therefore had no claim. The jury then found for the Defendant, and judgment was given accordingly against the architect.

FREND V. PRIOR.

Queen's Bench Division, before Mr. Justice Manisty and a jury, 1880. The Plaintiff prepared plans, etc., for a house for Defendant to be erected at Maybury to cost £1,200. Defendant did not like the design, and he and his architect visited the site, when Plaintiff suggested that he should build a more expensive kind of house, as more suitable for the situation, and Plaintiff stated that Defendant approved of the suggestion. He consequently prepared other plans and asked for tenders, the lowest of which was £1,950. The Defendant abandoned the work, and claimed that he had not authorized the Plaintiff to go above the \$1,200. The jury decided the architect was entitled to recover 3 per cent. on the amount of the tender.

CHAMPION V. O'DONOVAN, *et al.*

Cork City County Court. Plaintiff prepared designs for the restoration of a church, of which the Defendants were the building committee. The drawings were sent to the diocesan architect for approval. He required some slight alterations, and after Plaintiff had made these, the committee abandoned the work, and decided to build an entirely new church. It had been arranged that the Plaintiff should be paid $3\frac{3}{4}$ per cent.— $2\frac{1}{2}$ per cent. for the drawings and specifications, and $1\frac{1}{4}$ per cent. for quantities, making £139 18s. The defence was that the plans were unsuitable and impracticable; that the diocesan architect had reported to this effect, and that, moreover, the Plaintiff bought the drawings from a young man, and they were consequently not what they had authorized him to prepare. The judge in summing up informed the jury that the skillfulness and experience of the architect were not in question at all. It was for them simply to decide whether the Defendants had ordered the drawings, and if they had agreed to pay the Plaintiff as stated. The jury found a verdict for the Plaintiff of £120.

Mr. Justice Creswell (22 L. J., C. P. 273), has defined "PRELIMINARY DRAWINGS" to be such as are "to be approved of by the party for whom the plans are prepared."

It must depend entirely upon what agreement has been arrived at between the architect and his client for whom he has prepared preliminary drawings as to whether the architect can recover any payment for them if the work proceeds no further. Without any

agreement as to payment for preliminary drawings, or if the architect is unable to prove that the order given him to prepare them implied remuneration for them, this definition of Mr. Justice Creswell signifies that they as "preliminary drawings" were prepared only on approval.

In the case of *MOFFATT v. DICKSON*, in which Moffatt, an architect, sued Dickson, chairman of a committee for a lunatic asylum. Moffatt had been ordered to prepare plans for approval of the committee to be submitted to the lunacy commissioners, for which it was agreed that he should be paid £437 10s. He prepared a set of plans which, however, did not meet with the approval of the lunacy commissioners. He then prepared others which were also rejected, and he was ordered to prepare still another set according to their suggestions which were to be ready for a fixed date, the committee notifying Moffatt that unless these were satisfactory they must find someone else to go on with their work. The plans were prepared and sent in but did not meet with the approval of the committee, who then dismissed Moffatt from their employ. Moffatt brought action to recover his commission as agreed, but the court decided that he had been made aware of the ordeal his drawings would have to pass through, that it was his want of knowledge which prevented them being approved, and that therefore he had no claim.

In the case in New York in which an architect, *NOWRY*, sued the owner of a lot on Broadway for the value of plans for a proposed building on that site. The owner, it was proved, *had in conversation with Nowry induced him to prepare plans with the expectation of remuneration*. The owner denied having employed Nowry, but the jury decided that the conversation amounted to employment and the court ordered judgment for the architect.

There was a case in Baltimore in which an "architect" was asked to make plans for the improvement of a piece of building property. Plans were prepared but as no idea had been given to the architect as to the amount the owner would spend he made no estimate of cost. Tenders were asked for when the owners decided upon radical alterations necessitating new plans. These were tendered on but the owners did not go on with the work, and when the architect sent in his account for $2\frac{1}{2}$ per cent. on the lowest tender they refused to pay. Professional evidence was produced to show the custom of the profession, and the jury gave a verdict in favor of the architect, though at a smaller rate than that he claimed.

SCHNEIDER v. WAGGAMAN.

Tried at Washington Circuit Court. Here the proprietor refused to pay the architect (Plaintiff) for preliminary sketches he had ordered on the ground that he did not propose to go on with the

work. The architect sued him for \$150, and was awarded by the jury \$100; some of the jury were for the full amount, some were for awarding him \$50, so they compromised. Judgment entered accordingly.

WHITE v. MARSHALL.

Hudson Co., New Jersey, County Court before Judge McDermot. Mr. White, an architect, sued for his commission for preparing designs for a house that could be erected for \$6,000, and he brought expert witnesses to prove that his design could be carried out for \$5,900. Defendant claimed that the house could not be built for less than \$7,500 and based his claim upon bids he had obtained. He admitted ordering the plans, but stated that now they were of no use to him. Judge decided for the Plaintiff, awarding him 3½ per cent. on \$5,900 and costs.

FICKENS v. NEW YORK ATHLETIC CLUB.

The New York Athletic Club employed Mr. Fickens to prepare designs for a building to suit the centre of a site purchased by them, and designs for another to suit the corner of the same site. The corner building was decided on and the architect proceeded to obtain tenders, when he received a notice stating that the club had obtained a bid (without his knowledge) for this building of \$160,000, far above the proposed outlay. Mr. Fickens went at once to the committee and offered to get a bid from a responsible builder under bond for \$105,000 for the building according to his design. This was refused and another architect, Mr. H. W. Clinton, was forthwith called on and employed to carry out a design at the cost of \$118,000. The architect then brought suit to recover his commission on the drawings he had prepared. The case was referred to arbitration and the architect was awarded the full amount of his claim.

ROMEYN v. SICKLES.

Sickles was the promoter of a club or company for the erection of an apartment house, and arranged with Romeyn, an architect, who asked to be allowed to prepare plans for the building, that if the club was formed or the building carried out by him, Romeyn should be paid for his services. The club was not formed and Sickles gave up his scheme and the architect sued Sickles, trying to make him personally responsible. The case was decided on appeal against Romeyn.

III.

CASES RE COST OF BUILDINGS ABOVE CONTRACT.

EDBROOK v. WRIGHT.

Case tried at Denver, Col. Edbrook, an architect, was employed to prepare plans for a house to cost about \$36,000. Contracts were let and the house completed, but the total cost was \$41,000. The client (Wright) refused to pay commission on the additional \$5,000, and was sued in consequence by the architect. The judge laid down that when an architect was asked to prepare designs for a house or other buildings to cost in the *neighborhood of a certain sum* he could not be held responsible for what it cost to complete above that sum. Judgment therefore given in favor of the architect.

A case decided in the French courts in which the cost of the building when completed was nearly double the amount of the architect's estimate, was decided in favor of the architect who sued for his commission, basing it upon the total cost of the building, proving that the additional cost was for works ordered by his client from time to time beyond that which was contracted for. The client did not object to pay part of this, but when the bills came in he went and saw the builders and got them to make considerable reductions in their bills to which they agreed to avoid delay in settlement. The client (the Defendant) wished to pay a commission to the architect based upon the reduction of the bills. The court, however, decided that the actual cost of the building was as stated in the bills before any reduction had been made and that the architect's commission must be based on this amount.

In another case tried at Paris, July, 1885, necessary alterations and repairs were estimated by an architect to cost between 7,000 and 8,000 francs. During the works the architect notified the proprietor that a great deal more would have to be done than was at first considered necessary and the total cost came out at about 54,000 francs. The proprietor sued the architect for damages, but the court held that he had no case against his architect.

IV.

CASES OF LIABILITY OF OWNERS FOR ORDERS GIVEN BY THEIR ARCHITECTS.

SANTER v. HASLER & Co.

Before Lord Coleridge and a special jury. The Defendants employed an architect to prepare plans for and carry out certain mercantile buildings. When the works were completed a lofty chimney was found to be out of the perpendicular and the architect without communicating with his clients, the Defendants, ordered the builders, the Plaintiffs in the action, to adopt a novel plan of tying a rope round the chimney and hauling it upright by a powerful winch. The result of this remarkable remedy was that the chimney was pulled down. The Plaintiffs were ordered to rebuild it and now sued the owners for payment for this work. The defence was that the Defendants had not ordered the architect to attempt to have the chimney straightened in this manner and that he had no implied authority to give such orders. Lord Coleridge ruled that such was not the fact. The architect was the agent of the owners and therefore he would give judgment for Plaintiff, but ordered execution to be stayed in order that Defendants might have time to give notice of appeal against his ruling.

[NOTE.—It does not appear that this case was carried any further.]

See Byrne & Wilmot v. Stafford (Dismissal of Architect. —No. vii.) (Counter-claim.)

V.

CASES RE ORDERS GIVEN BY OTHERS THAN THE PROPRIETOR.

MORRIS v. CUTTER.

The Plaintiff was the owner who brought suit on appeal against his architect, Mr. Manly Cutter, of New York. Mr. Morris had commissioned Mr. Cutter to carry out a design for a private house approved by him and while the works were proceeding had occasion to leave home for some time. During his absence, Mrs. Morris, wife of Plaintiff, ordered some very costly interior work which the architect had carried out, accordingly bringing up the cost of that particular part of the house from \$5,000 to \$12,000. Mr. Cutter brought suit to recover his commission for this work

which Mr. Morris refused to pay. The case ran on for years and was finally decided in Mr. Cutter's favor. Mr. Morris appealed so that execution was stayed and the case has not yet been concluded.

VI.

CASES IN WHICH ARCHITECTS HAVE RECEIVED
AND ACTED UPON ORDERS NOT UNDER SEAL,
GIVEN BY CORPORATIONS POSSESSING SEALS.

HUNT V. WIMBLEDON LOCAL BOARD, 1885.

Mr. Hunt, architect, at request of the Wimbledon Local Board, prepared plans for a building which were used by the Board to obtain tenders from contractors. Tenders came out too high, and the Board refused to pay on the ground that the buildings were of too costly a character. The jury found that the Board had ordered the plans to be prepared, but the court held that as the orders of the Board were not given under seal, the architect could not recover. section 85 of the Public Health Act, 1848, enacts that every contract above £10, and section 174 of the Public Health Act, 1870, enacts that every contract above £50, must be in writing, and sealed with the seal of the authority. The court held that this was imperative, and not a matter of choice, and that any other method of contracting was ineffectual. Therefore the architect *could not recover*.

YOUNG V. MAYOR AND CORPORATION OF LEAMINGTON,
CLARK V. GUARDIANS OF CUCKFIELD UNION, and

MELLIS V. SHIRLEY LOCAL BOARD, similar cases, decided
against the architects, the contracts being over £50 in amount.

SCOTT V. GREAT AND LITTLE CLIFTON SCHOOL BOARD.

A similar case, but decided in *favor* of the architect by Mr. Justice Mathew, 1884. He pointed out that although the School Board was a Corporation and had a seal, yet that by section 35 of the Elementary Education Act, 1870, it might appoint a clerk, treasurer and other officers; that by rule 7 in the schedule of the Act the "appointment of any officer of the Board may be made by a minute of the Board, signed by the chairman and countersigned by the clerk, and any appointment so made shall be as valid as if made under the seal of the Board." Mr. Scott was appointed "Architect to the Board." Mr. Justice Mathew found that the architect was a "necessary officer," and that his appointment was entered upon the minutes, and that directions were given to him at Board meetings and recorded in the minutes. He therefore decided that the architect *could* recover.

See case Norman v. Lezant School Board (rightful commission), No. 1, in which the amount claimed was below £50, and nothing was said as to agreement being under seal or not.

Mr. F. Meadows White, Q.C., commenting on this subject said : " A difficulty does arise when the contract between the architect and the School Board does not follow on or arise out of work done by him as an appointed officer of the Board, but is the result of an isolated transaction in the ordinary way of business. In such a case I should consider it very doubtful indeed whether the architect could recover where the contract was not under seal, and I should certainly advise the architect under such circumstances to obtain a sealed contract."

POWER V. BOWMANVILLE SCHOOL BOARD.

Mr. Power, architect, of Kingston, Ontario, brought suit to recover commission for professional services in connection with the preparation of plans for the Defendants, and brought professional evidence as to the custom with regard to his claim. Defendants produced no witnesses, and did not deny that they had employed the Plaintiff, but put in the plea that their seal was not attached to any agreement with the Plaintiff. Court, though sympathizing with the architect, held he could not recover. Judgment for Defendants accordingly.

VII.

CASES OF DISMISSAL OF THE ARCHITECT.

BIRCH V. EARL OF SHREWSBURY AND TALBOT.

Mr. Birch, architect, had been employed by Lord Shrewsbury to carry out restorations to Ingestre Hall after it had been damaged by fire, and to make certain alterations and add a stable. The work was nearly completed when Mr. Birch was summarily dismissed without any explanation. After waiting a long while in the hope of some explanation he proceeded to make out and send in his bill for his services. For some reason or other he had originally agreed not to make any charge for a portion of the work he carried out, but since his abrupt dismissal he considered the circumstances were altered and included in his bill charges for this work also at the usual rates. Mr. Birch, finding he could get nothing out of Lord Shrewsbury, sued him and brought as witnesses on his side Mr. Charles Barry and Mr. William Young. Mr. Charles Barry gave his evidence, whereupon Lord Shrewsbury's counsel gave up the case and agreed to settle the bill and pay all costs if the action was withdrawn, which was accordingly done. Lord Shrewsbury was held to have broken his contract with Mr. Birch without cause.

NOTE.—Proprietors sometimes insist on alterations in the design of a building after the work has been begun; desiring, for instance, a bay window to be thrown out to such a room or some feature to be added that in the opinion of the architect will entirely spoil the effect of his design, and despite the protests of the architect will have his way, and the building has been completed, the result being that architecturally it is spoiled and the architect thinks his reputation will suffer in consequence. However, he must make the best of his annoyance and disappointment. As under English and United States laws he *could maintain no action for damage to his reputation under these circumstances.*

BYRNE AND WILMOT v. STAFFORD.

Chertsey County Court, before Judge Lushington, May, 1885. Messrs. Byrne and Wilmot, architects, were employed by the Defendant, a doctor, to prepare plans for and carry out for him a residence at Bagshot, and it was agreed that their commission should be 5 per cent. on the lowest estimate, no charges being made for travelling expenses as one of the firm had other work in the neighborhood which required constant visits. The builder of the doctor's house failed and Defendant asked his architects to prepare specifications for the completion of the works for which a fee of three guineas was agreed upon. Owing to the illness of the senior partner a delay of a week was caused, and the Defendant wrote a hasty letter dismissing Plaintiffs altogether, who then sent in an account for £43, which was not disputed, but Defendants set up a counter-claim for £47, claiming that certain omissions had been made from the plans and specifications by the contractor before he failed on the orders of the architects. The Plaintiffs claimed their right to make alterations as the work proceeded as they saw that such were necessary, the cost either for deductions or additions to be measured at completion and valued according to priced quantities prepared by an independent surveyor which formed part of the contract. The judge pointed out to the jury that architects were not to be held responsible for omissions of the builder unless negligence on their (architects') part was proved. There was no evidence of such negligence. The Defendants had made a serious mistake in dismissing the architects without sufficient cause. The counter-claim, if made at all, should be made against the estate of the builder, not against the architects, who were only his agents and acting within their rights. The jury returned a verdict for the Plaintiffs for the full amount of their claim.

See Bell v. Moss—(rightful commissions. No 1).

See McLachlan v. Grant—(rightful commissions. No. 1).

See Fickens v. New York Athletic Club—(work abandoned. No. 2).

VIII.

CASES OF RESPONSIBILITY OF ARCHITECTS IN CONNECTION WITH DEFECTIVE WORK.

MOSDELL V. MITCHELL, *et al.*

Jan., 1891. Mosdell, a widow, claimed damages from the owner (Mitchell), the architect (Miller), and the builders (Oldrey & Co.), of a house in Great Titchfield Street, London, for the death of her husband through the falling down of the house. She claimed £250 for herself, and £50 for each of her three children. Mitchell employed Miller to prepare plans, etc., for the house, and the contract was finally let to Oldrey & Co., builders. Oldrey & Co. employed Mosdell as carpenter and joiner, and proceeded to erect the house from Miller's drawings in August, 1888. All went well till November 9th. when the house collapsed, killing five men, of whom one was Mosdell, the husband of the Plaintiff. The cause of the downfall being a basement wall which was too thin for the superimposed weight. The case was tried before Lord Coleridge, who held that Mitchell having employed an architect and contractor, had done all that he could to ensure safe building. The architect and builder did not appear. Lord Coleridge stated that "as a *prima facie* case has been made out against them, which they are not here to answer, the jury must consider the question of damages. You (addressing the jury) must not give indemnity, only compensation, and allocate the sum between the widow and the children." The jury found for the widow £250, and for each child £50 as claimed. Lord Coleridge gave judgment accordingly *against* Miller (architect), and Oldrey & Co. (builders), but *for* Mitchell (the proprietor).

See Stevenson v. Stephenson (rightful commission. No. I.)

See Adam v. Armstrong (rightful commission. No. I.)

See Money Penny v. Hartland (inaccurate drawings No. IX.)

NOTE.—If damage ensues from defective work, in order to maintain a claim against the architect it is necessary to prove that it has occurred through carrying out his orders either as shown by drawings or specifications, or by subsequent orders written or verbal. If failure has occurred through following the plans and specifications, an architect may be able to save himself from liability if he can prove he has given orders correcting the mistakes therein. The builder will, no doubt, try to save himself at the architect's expense, so that it is advisable to give such correcting orders in writing, and to keep a copy of them. Where the builder has acted on his own responsibility and executed work without any orders from the architect, and failure occurs, he must be held liable unless he can prove

that the architect inspected and passed it as satisfactory. Where no clerk of works is employed, and the builder is left to put in what kind of work he pleases, the architect must prove that the failure has occurred from work done contrary to the spirit and meaning of the drawings and specifications. A builder at law is as much bound to know his own business as anybody else, and he cannot save himself any more than an architect can by an attempt to put the responsibility for his bad work upon the shoulders of another. Indeed, it has been held that a builder ought to refuse to execute work which he knows or ought to know will result in the failure of the structure. In the event of a difficulty as to the exact meaning of the drawings or specifications, the builder must ascertain from the architect what is intended, or he executes the work on his own responsibility, and will be held liable.

See Byrne and Wilmot v. Stafford (dismissal of architect. No. VII.)

HUBERT V. AITKEN.

Aitken is the owner of an apartment house erected from the designs and under the superintendence of Hubert, an architect. In connection with the steam heating apparatus the architect had consulted with the heating engineer about the size of the flue required, and the flue was built according to his suggestions and instructions. The architect sued the owner for the balance of his commission, but the Defendant claimed that this flue was unserviceable and caused too great a consumption of coal. The court decided that it was the duty of the architect to know all about the requirements of the chimney and that he and not the engineer was responsible.

See Money Penny v. Hartland (Inaccurate Drawings. No. IX.)

In cases where an owner interferes and gives his orders to the builder, changing the architect's orders, and has the work done in a way that differs from the plans and specifications and in a manner that will endanger the stability of the structure, it is the architect's duty, and to his advantage as relieving him from responsibility, to notify the owner, in writing, of the probable result of his interference.

French cases prove that an architect cannot be held responsible for the failure of work which, when completed under his supervision, was perfect. The *subsequent* failure, resulting from bad workmanship, is entirely the fault of the contractor.

A case tried in the Fourth Chamber of the Court of Paris, November, 1886, it was decided that where an owner insists on work being carried out according to his wishes and in a manner that the architect and contractor declare to be unsafe, and they finally agree to carry it out only on receiving from the owner a

written discharge from all responsibility, they are only saved from responsibility as far as the owner himself is concerned, and are liable to prosecution in the event of injury to life or limb through failure of the work.

But in the Court of Cassation it has further been decided that it is not sufficient to avoid responsibility of a constructor to establish that he only carried out the plans and specifications and instructions of the owner. The architect or builder must absolutely refuse to execute work entrusted to him under conditions which may endanger its stability.

A case decided in Paris against the architect and owner was one in which tenants sued for damages owing to the floor of a new building they occupied giving way through the rottenness of the joists. The owner, before the building was commenced, sent the architect and contractor to pick out beams and joists from the yard of a dealer in building material, whom he paid for the stuff selected. The architect and contractor together made their choice of such timbers as they thought fit, and they were incorporated in the building with the result related. The judge condemned the architect to a fine of one hundred francs and the owner fifty francs, and to pay together to the tenants two thousand francs and costs.

IX.

CASES OF INACCURATE DRAWINGS.

MONEYPENNY V. HARTLAND, *et al.* (1 C. and P. 352.)

In this case an architect prepared designs for a bridge over the Severn River, and being informed by the proprietors that they had ascertained the nature of the bottom, and that it was perfectly sound, he prepared his plans accordingly, and contracts were let. It was, however, discovered that this information was incorrect, and a different class of foundation had to be put in, involving a further outlay of £1,600. Lord Chief Justice Abbott decided that the architect was responsible, that he should have informed himself of the nature of the bottom, and not taken the word of others, consequently he must take the consequences.

The case of WHITBY V. DILLON (2 F. and F. 67) has decided that even the acceptance by the proprietor of drawings for a building to be erected on soil unsuitable for that building does not render the proprietor liable. The architect must make himself acquainted with the nature of the soil upon which he is ordered to build or to prepare drawings for.

X.

CASES OF OWNERSHIP OF DRAWINGS, ETC.

The leading case on this subject, and one which forms a precedent in similar cases, is that of the British Government against the heirs of Sir Charles Barry to recover from them the drawings of the Parliament Buildings at Westminster. The case was carried through the various courts, and the highest court finally decided that they were the property of the Government, and that the heirs had no right to withhold them.

CLARKE V. MACNAMARA.

Tried at County Court, Altrincham, Ireland, 1890. Macnamara, an architect, understanding that his clients would demand the drawings of the building he had executed for them, rather than give them up destroyed them. The judge held that he had destroyed the property of his clients. Happily for him there were copies deposited at the office of the Local Board, and he offered to make tracings of them, to which the clients assented, so that further prosecution was stopped.

NOTE.—These decisions do not affect any arrangement that an architect may make with his client about the ownership of the drawings before he commences them. But if an architect desires to retain plans, he had better let it be distinctly agreed in writing between him and his client before anything is done that they are to remain in his possession. Without some such agreement, however, an architect cannot refuse to give up the drawings to the proprietor if he demands them.

SCHOOL BOARD OF LONDON V. NORTHCROFT, SON AND NEIGHBOR, *et al.*

This case, although being one of an error made by a quantity surveyor, has its bearing upon architects. A quantity surveyor had made an error in taking out the amount of cubic yards of excavating, allowing for 677 cubic yards more than there actually was, and the builders were paid for this by the Board, but on the discovery of the error at once refunded the money to the Board. The Board in order to set up a case against the quantity surveyor demanded through its solicitor that the quantity surveyor should give up the documents relating to the matter, but he refused on the ground that they were private property. Mr. Justice Smith considered that they were private property. "Ink, paper and brains used in making them are all the Defendants, and they are right in refusing

to give them up." "It has been argued that it is a breach of duty on the part of a quantity surveyor to refuse to give up his memoranda to his principal for the purposes of measurement, but that is exactly what the Plaintiffs have not required them for; they wanted the documents in order to make a case against the Defendants." This decision forms a precedent of great importance to quantity surveyors, and would no doubt serve as a precedent for an architect under similar circumstances, though it would not under the present state of the law extend to the withholding of the drawings.

LAMB AND ARMSTRONG v. HARBOTTLE, 1888.

Before Judge Hall, Newcastle County Court. The Plaintiffs, architects, had been employed by the Defendant to prepare plans for an hotel, the work, however, was not proceeded with, and they charged Defendant £50 for services rendered. The defence was that the plans had not been delivered up to Defendant. His honor said *that in most cases* the plans did not go into the possession of the parties but remained with the architects for reference and to work from. *The object of having plans made was not for the sake of having plans made, but for the purpose of having something constructed from them.* The plans were not the ulterior object wished, but something as the result of the plans, which, *as a rule*, remained in the office of the architect. He, therefore, ordered judgment for the architects.

XI.

CASES CONCERNING CERTIFICATES.

Contractors sue for payment of certificates.

LAPTHORNE v. ST. AUBYN, *et al.*

An architect, Mr. Alfred Norman, had given a final certificate to the contractor, Lapthorne, for work done in the erection of St. Mark's Church, at Ford, Devonshire. The contract contained clauses (1) to the effect that the architect was to decide all cases of dispute as to meaning of contract and plans, etc., and that his decision should be final and without appeal. (2). That no deviations or extras were to be executed by the builders without the written order of the architect, and that orders for all deviations and extras to cost more than £10 must be signed by the architect and countersigned by two of the committee. The Defendants (the building committee), claimed in many instances these orders had not been countersigned by two of the committee, and that they could not be charged for unless the contractor could produce the

orders properly signed according to the contract. They also claimed that the architect had granted certificates which he had no right under the contract to grant. Mr. Justice A. L. Smith, in giving judgment, said "that by entering into such a contract both parties had put themselves entirely under Mr. Norman's (the architect) thumb. They had agreed to abide by his decision whatever it might be if there were no fraud, and there was no suggestion of that. It was argued, because under the 6th clause, no deviations or extras over £10 were to be charged unless countersigned by two of the committee; that, therefore, it was expressly meant to limit Mr. Norman's power of decision; that, in fact, he was only authorized to certify for work done and executed under those conditions, and not for all the work actually executed. Was this what the contract meant? I could not read it so, and it is clear that Norman was to certify on all the work, and one clause, the most important to my mind, stipulates that Norman's decision was to be final and without appeal. Norman had certified, and whether he had in his certificate made a mistake or not, it was not lawful for the Defendants to reopen that certificate to correct alleged mistakes or for the purpose of eliminating those extras not countersigned by two of the committee. There would, therefore, be judgment for the Plaintiff for £560, being the amount claimed together with the interest due upon the same."

RICHARDS v. MAY, 1883.

Tried before Justices Cave and Day. The decision in this case was similar in principle to the foregoing, although the clause providing that the architect's decision should be final was not expressed in such decided terms. The fourth clause of the contract read, "all extras and additions, payment for which the contractor should become entitled to under the said conditions, and all deductions which the proprietor should become entitled to should be respectively paid or allowed for at the price which should be fixed by Mr. S. J. Lethbridge, the surveyor appointed by the Defendant." The court held that this clause gave Mr. Lethbridge power not only to certify to the amount of extras but also to determine what were extras, and that the Defendants were bound equally with the Plaintiffs by his certificate. The court gave judgment accordingly for the full amount of the certificate.

MORGAN v. BIRNIE.

(9 Bing, 672), first reported case of the kind.

GOODYEAR v. MAYOR OF WEYMOUTH, and
LAIDLAW v. HASTINGS PIER CO.,

Were similar suits decided upon the same principle.

BRUNSDEN V. STAINES' LOCAL BOARD.

Before Mr. Justice Mathew, March, 1884. Mr. Johnson, the architect, employed by the Board for the erection of a town hall at Staines, certified on completion of the work to the amount he considered due to the builder Brunsden, who presented the certificate to the Board and received payment. Some time after he brought an action against the Board to recover the amount of items struck off by the architect, claiming £216 13s. 11d. This included £50 alleged balance on contract, and a claim for extras and damages were also asked, for refusing to refer matters in dispute to arbitration as arranged for by the contract. The contract work was finished in July, 1881. In December, 1881, the architect gave his certificate in the following words: "The architect reports that the works were completed July 16, and that Mr. Thomas Brunsden is entitled to receive the sum of £386 11s. 3d., being final balance due for contract and extra works, less the sum of £50 reserved till July 16, 1882." (Note the reservation of £50 for a whole year). The Defendants sent a cheque on January 3, 1883, six months after expiration of the time of reservation for the amount of certificate, less the £50 which the Plaintiff accepted on account and Defendants refused to refer the matter to arbitration. They paid into court £50 and one shilling as damages for breach of contract to refer. *The contention was that as the architect had dealt with some extras and allowed for them in his certificate, the Plaintiff might open up the matter again for the purpose of claiming on other extra work he actually carried out but was not allowed for.* It has been shown in other cases that the proprietors could not re-open the matter when the architect had given his certificate and contend that the contract had not been complied with with reference to the extras already allowed. Then on the same principle why should the Plaintiff be entitled to re-open it. The Judge said "the Plaintiff cannot therefore recover any damages for a refusal to refer to arbitration when, in my opinion, he would not have been entitled to recover anything under it. The Plaintiff must show a certificate to entitle him to receive payment claimed, and this he cannot do. He had been paid up to the full amount of extras which had been certified for, and as to damages for refusal to refer the arbitration could not have given more than the Plaintiff obtained by his action. Therefore Plaintiff had sustained no damage, and that one shilling paid into court was sufficient."

STEVENSON V. WATSON.

May, 1888, before Lord Coleridge and Mr. Justice Denman. This was an action by a builder against an architect for not certifying in his final certificate for the full amount of extras claimed by the Plaintiff. Plaintiff claimed that the Defendant had

not used sufficient care in looking over the account and had not fairly estimated the cost of the extra works. Mr. Mills, Q.C., argued for the Defendant that in his position as architect he was a quasi-arbitrator, and that according to law it was not necessary that he should employ special skill and care. Lord Coleridge said that the architect had exercised his functions fairly. Mr. Justice Denman concurred and added that the architect was right in refusing to *reconsider his final certificate*.

LEWIS V. HOARE.

A case came up before Mr. Baron Huddleston in which a builder sued for the balance due to him on a contract for the erection of certain buildings, the owners refusing to pay said balance because the final certificate had not been given by the architect. The contract provided that payments were to be made to the builder on the architect's certificate. Mr. Baron Huddleston decided that as the final certificate had not been given, the house was not completed according to contract. The Court of Appeals reversed this decision. The case was then carried to the House of Lords, where the Lord Chancellor, Lords Blackburn and Watson confirmed the decision of the Court of Appeals. "*The issuing of a certificate would not make the house complete if it were not complete, and withholding a certificate would not make it incomplete if it were actually complete.*"

BRUNSDEN V. BERESFORD.

Brunsdon, a builder, claimed, as in the foregoing case, the balance due to him on his contract although the architect's final certificate had not been given. The contract provided that the architect's certificate was a condition precedent to the builder's right to receive payment for work done. The case was tried before Mr. Justice Watkin Williams and a jury, July, 1883. The judge said "If you (the jury) think that the architect *acting on his own judgment* withheld the certificate you must find for the Defendant (the owner). If, however, you are of opinion that the withholding of the certificate *was due to the improper interposition of the Defendant*, and that he prevented the architect from giving his certificate, you must find for the Plaintiff (the builder)."

BOTTERILL V. WARE BOARD OF GUARDIANS, 1886.

Similar case, referred to special referee, who found that the withholding of the certificate by the engineer was honest and beneficial. Lord Esher said "It was necessary to have the engineer's certificate for the completion of the work, and as there was no such certificate the return could not be maintained. If, indeed, there had been *fraud and collusion between* the engineers and their employers, then the withholding of the certificate might not be a bar to the claims of Plaintiff, but its having been *wrongfully* withheld (as claimed by

Plaintiff) was no sufficient answer to its absence." Lord Justice Bowen said "It was common for contractors who had put themselves in the power of the engineers or surveyors of the employers, to bring actions under a sense of supposed wrong in the wild hope of somehow or other getting a decision contrary to strict law. The want of the engineers' certificate was fatal. It was impossible for the contractor to get over it unless the certificate was withheld by fraud or collusion."

BROWN V. BRIDLINGTON CEMETERY BOARD.

This was a claim of a builder for the balance of his account for the erection of cemetery chapels at Bridlington, York, for part of which the architect's certificate had been given. It came before Vice-Chancellor Sir R. Mallins in February, 1881. A Mr. Smith, architect, at Nottingham, sent in designs in competition for this building, which were accepted by the Board. Specifications were prepared, and Mr. Smith estimated that the entire cost would be £2,500. Tenders were asked for, and the lowest was sent in by Mr. Brown of Bridlington for £5,912, which after cutting down was accepted at £3,808. Time for completion of the works was set down for 1st January, 1877, date of tender being June 10th, 1875. The works proceeded slowly, and the Board waited patiently till September, 1879, a year and nine months after contract time for completion. A strike of masons delayed the work for a couple of months. They then took possession, alleging that the contract was not even then completed. The builder had received up to that date £4,235 7s. 8d., and held certificates from the architect for a further sum of £1,238 18s. 7d., but he claimed £6,000 beyond that. Defendants disclaimed all liability beyond what they had already paid, and they filed a counter claim of £1,900 for delay in completing. The Vice-Chancellor suggested that all charges and imputations of fraud being withdrawn, and the certificates and awards not being insisted upon as binding, there should be a reference to Sir Henry Hunt for settlement. In November, 1881, Sir Henry Hunt made his award in favor of the builder, which brought up the cost of the building to £7,858, or £4,050 above the contract, exclusive of the costs of the action and the architect's commission.

SCHULTE, *et al.* v. HOPKINS, *et al.*

Queen's Bench Division, before Messrs. Justices Manisty and Bowen, Nov., 1880. The Plaintiffs in this case ordered a quantity of iron rails from the Defendants, and entered into a contract with them by which it was arranged that a certain inspector should examine and test a percentage of the rails and certify to them. This was done and the certificate granted, but Plaintiffs claimed breach of contract in delay in delivery of the rails. The Defend-

ants argued that the certificate was final and binding and that it could not be set aside or be gone behind. The court gave judgment for the Plaintiffs on the ground that the contract did not expressly state that the inspector's certificate was final and conclusive.

DAVIS v. TAYLOR.

In this case the architects had refused to certify to work that was properly carried out, but the contract made the decision of the architect in all matters of dispute *final*, and therefore the Defendants could not recover.

JONES v. ST. JOHN'S COLLEGE, OXFORD.

Here the architect had ordered additional works, but refused to allow any extension of time for their completion. The Plaintiff, however, could not recover as the contract made the architect sole arbiter.

KIMBERLIE v. DICK.

This was another case in which contractors sued the proprietor for payment on additional works. The contract made the architect the final referee, but in this case there was a definite agreement between the architect and his client that the building should not cost beyond a certain sum, and of this agreement the contractor proved he knew nothing. The effect of the agreement was that the architect would have to pay out of his own pocket for any additional works he certified to, so that he was biased in making his awards. Had the contractor known of the existence of the agreement he would not have submitted unreservedly to the arbitration clause. The Master of the Rolls directed that inquiry should be made forthwith as to the amount of real additional works, and in fact took upon himself the office of arbitrator for which the architect was disqualified, and finally gave judgment for the contractor.

From Report of Committee of the Western Association of Architects on Legal Decisions Re Certificates.

"An architect had charge of the erection of a house for a widow. The contracts had been let to a carpenter in one. It provided the architect to be umpire, and payments were to be made on his certificate. Specifications provided a 'first-class' job. Through the neglect of the architect the work was carried out poorly, extremely poorly in many respects, so that the widow refused

to pay the final certificate. The case went into court and the judge decided that the widow was bound to pay the architect's certificate, just or unjust, and that if she had any case at all she might bring suit against the architect. So she did, and recovered \$800, which was paid by the architect."

"A widow erected a mansion under the charge of an architect. She had difficulty in obtaining the plans. Her directions as to changes were not heeded, and she became frightened enough to consult a lawyer. A private superintendent was appointed. The architect was notified in writing as to changes being required here and there and as to work being carried out carelessly. The house was completed and every certificate paid, since it would have been useless to contest the payment of any of them. There was no evidence as to fraud, though such was undoubtedly committed. The widow then sued the architect and recovered judgment for \$4,500, which remained final."

"A citizen erected a block of houses during the winter. The architect neglected to provide means for keeping out the frost and allowed the mason to build dwarf walls upon the frozen ground. Through this the building became to a considerable extent damaged, and the owner brought suit. The first verdict obtained was \$1,400 against the architect, who appealed and received, incidentally so, as it would appear, an order for a new trial. The case was thereupon tried in another court and a verdict obtained against the architect for \$1,900. The case had been tried more effectively and the facts brought to the understanding of the jury."

"In all these cases the specifications had a preamble in which the architect was declared to be, in so many words, sole arbiter."

Case of overpayment to a builder made on the certificate of the architect.

Court of Common Pleas, New York, 1887. By an error of the architect's clerk who filled up the contract form, the amount of contract was entered accidentally as one thousand dollars more than the amount of the accepted tender. Neither the architect or the proprietor detected the error and the contract was signed and the work proceeded with. The proprietor having to leave home immediately, left it to his son to make payments to the builder upon the architect's certificates, who paid the final certificate, which was issued according to the figures of the contract. On the return of the owner he discovered the mistake and immediately demanded repayment from the builder, who refused on the ground that an additional thousand dollars (above his tender) had been expended

on the works. The case came before the courts and it was held that the error was a simple clerical error on the part of the architect's clerk, and that the contract should be altered to correspond with the amount of the accepted tender, and that the builder should refund the money he had obtained by mistake.

It has been decided in the French courts that "a certificate is an opinion, an estimate, things in their essence variable according to the character of the person making them." "A certificate prepared by the architect is a piece of advice which the owner is at liberty to follow or not as he pleases." "An opinion, advice, or estimates carry with them no responsibility unless they are given fraudulently, or show negligence, carelessness or great and obvious errors."

XI.

CASES NON-ACCEPTANCE OF LOWEST TENDERS.

ROSCOE'S DIGEST OF BUILDING CASES.

The law with regard to the acceptance of tenders is thus stated: "A person who invites, by writing or by word of mouth, tenders for work or for the purchase of anything, does not by so doing impliedly promise to accept the lowest tender or the highest tender or to accept any one of such tenders. The notice to persons inviting to tender is merely a proclamation that he who issues the notice is inviting to receive and consider offers. The leading case on this subject is that of *Spencer v. Harding*, Law Reports, 5 Common Pleas, page 561, decided 1870 by Messrs. Justices Willes, Keating and Montague Smith, and has never been overruled."

NOSOTTI v. SAUNDERS, 1886.

Plaintiff, a builder, sued for expenses incurred in making up and submitting a tender when specially requested to do so. Judgment given for Defendant, the court remarking that Plaintiff could not recover unless he had made an agreement with proprietor (who asked him) to the effect that he should be paid.

THATCHER v. ENGLAND, 3 C.B., 254.

MAINPRICE v. WESLEY, 6 B. & S., 420.

Similar Cases, tenderers suing for remuneration because their tenders, which were lowest, were not accepted. Decided as in *Nosotti v. Saunders*.

XII.

CASES RE DUTIES OF ARBITRATORS.

WARD v. CAVE.

An architect had been appointed arbitrator in a building dispute and made his award. This case was one arising out of the award of the architect. Objections being taken to this award on several grounds, one of which was that the arbitrator had sent his clerk to go through the buildings and to report to him thereon, and it was claimed that the arbitrator should have gone himself and made a personal inspection. Mr. Justice Grantham overthrew this objection. An arbitrator, therefore, may depute "mere rule of thumb" work to a clerk, but he must act on his own judgment, and anything more than mere rule of thumb work, he must attend to himself.

See also cases re certificates as to duty of architects as arbitrators under contracts between owners and contractors.

XIII.

CASES RE COMPETITION.

WALSH v. ST. LOUIS EXPOSITION AND MUSIC HALL ASSOCIATION.

Tried at Missouri. This was a case in which the Defendants having advertised for designs refused commission to the architect whose design obtained the highest place at the voting of the committee to carry out the work. One of the clauses stated that the author of the design placed first should receive five hundred dollars, but another stated that the architect who "is successful shall not receive five hundred dollars, but shall be engaged as architect to superintend and shall be paid for performing such duties the usual commissions as adopted by the American Institute and the St. Louis Institute of Architects." Walsh proved that his design was placed first, but the work was given to another architect to carry out. Walsh sued for his commission at 5 per cent. on the estimated cost of \$20,000. Defendants argued that this clause did not necessarily mean the person who submitted the best plan, as he might have been unfit to carry out the design, but that it meant the architect "who should on the whole be considered worthy of the

appointment." The first court that tried the case (Circuit Court) decided against the architect who appealed. The Court of Appeal reversed the decision of the Circuit Court, and when the case was carried before the Supreme Court the judgment of the Court of Appeal was sustained in favor of the Plaintiff Walsh.

Case carried to the Superior Court, Suffolk County, Mass. An architect sent in plans in competition, and found that his design was placed first but the result of voting was not communicated to him. The committee instead of employing him forthwith, decided to find out who would carry out the building they required at the least charge for professional services. The Plaintiff was approached and agreed to prepare plans and specifications and superintend the work partially for \$1,000. The architect then presented the drawings previously sent in in competition, and as requested made sundry modifications. He then received a letter from the committee asking him to resign his commission, which he refused to do, and was in return notified to do nothing further. Another architect was in the meantime employed. The architect then, on the ground of his agreement to do the work required for \$1,000, and that he was ready and willing to proceed with his work, but was prevented from so doing by the committee, brought suit for this amount. Defendants stated that they owed nothing, as Plaintiff had sent in sketches used in the competition, for which they had not proposed to pay. The jury returned a verdict for the architect of \$761 24s.

A case decided by Supreme Court of Pennsylvania was one in which an architect sued a building committee for compensation because his drawings sent in in competition were accidentally locked up and not examined. The case was previously tried in the Court of Common Pleas, where judgment had been given against the architect. The Supreme Court confirmed this decision.

WALBANK V. GOVERNORS OF INSANE ASYLUM, Montreal, Que.

Mr. Walbank, architect, sent in designs in competition with others, but the committee instead of examining the designs gave the work of carrying out their proposed building into the hands of an architect they had previously employed, who at the trial stated that his appointment had nothing to do with the result of the competition. Mr. Walbank sent in under seal an estimate of the cost made by a contractor, marking the envelope "not to be opened unless plans are accepted. The Governors did open it, however, and made notes in their minutes of its contents. The Governors claimed that there was no proof that the building could be carried out for the stipulated sum, and that the design had not been sent in according to the rules of the competition. Judgment given for Defendants.

XIV.

NOTES ON AN ARCHITECT'S LIABILITY WITH REGARD TO INSPECTIONS.

When an architect is called in to make an inspection of a building in reference to its stability he must be careful to ascertain for what particular purpose the inspection is made, and in making his report should state that he reports in reference to that purpose. For example, if he reports that for the ordinary purposes for which a building to be rented may be used, that building is sufficiently substantial, if a failure occurs when the premises are occupied it would be necessary for him to prove that the purposes to which the building had been put were out of the ordinary such as he reported, in order to save himself from liability. If a failure occurs through putting the building to an ordinary purpose such as he contemplated in his report he would be liable for damages. The fact that he had not noticed that the ends of joists, for instance, were rotten, although concealed, would not save him from liability. It would be held that it was his duty to have the floor boards up and to examine into the condition of the joists and so on. If the proprietor refused to allow this he must be able distinctly to prove this in the event of accident, and should note this or any such facts in his report.

XV.

NOTES ON THE RIGHT OF SUPPORT OF ADJOIN- ING PREMISES.

In the tearing down of an old building against which another building is standing it should be clearly ascertained whether the adjoining owner has really any *right to support* from the building to be torn down. In the case of a party wall, undoubtedly he is possessed of the right of support of the half of the party wall belonging to the building to be torn down, and the question would arise as to what extent that half of the party wall was supported by the rest of the building, and as to whether the adjoining owner had any right to that support. In the absence of *right to support* the adjoining owner should shore up his own building on receiving notice of the contemplated alterations, or if his premises fall or are otherwise injured by the necessary works he has no remedy, but notice of the tearing down of the building must be sent him and

time allowed for him to make his premises reasonably secure. It devolves upon the adjoining owner, however, to prove his right of support.

XVI.

NOTE RE AGREEMENT BETWEEN CLIENT
AND ARCHITECT.

Agreements to do certain specific acts that will occupy more than a year to complete must be in writing or they cannot be sustained before the courts. Thus, if an architect has charge of the construction and execution of a building which, by the contract with the builder, is not to be completed under a year, the architect must have a written agreement with his client, if he does not wish to run the risk of losing his commission, as without that agreement he cannot recover. The contract may be completed within ten months, but the architect must decide, according to circumstances, whether his work in connection with the building will be finished within the year or not. If, according to the contract with the builder, the work is to be completed so soon that there is not the slightest doubt that the architect's work will also be finished under the year, and yet from some unforeseen cause or other the work drags on over a year, the necessity for an agreement in writing does not exist. This is the law of the "STATUTE OF FRAUDS."

As to the FORM OF AGREEMENT between the client and his architect that will satisfy the statute, a letter written and signed by the *client* mentioning the works to be executed by the architect, and mentioning the architect's name, is sufficient. But it is not always possible to get such a letter from a client, in which case it is advisable, if not absolutely necessary, for an architect to write himself to his client, referring to the work he is commissioned to execute, stating terms, describing the work, and adding any clauses he may think advisable to prevent any doubt as to his intentions, etc., arising in the mind of his client. If the client receives this, and allows the architect to proceed with the work without making any objections to the terms, it will be held that he has agreed to them, but it is as well to state that in the event of receiving no answer to this letter within a certain time the architect will consider it as accepted.

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